IN THE HIGH COURT OF KERALA AT ERNAKULAM

Present:

THE HONOURABLE THE CHIEF JUSTICE MR. H.L.DATTU

and

THE HONOURABLE MR. JUSTICE K.T. SANKARAN

THURSDAY, THE 27TH SEPTEMBER, 2007/5TH ASWINA 1929

S.T.REV. No.285 of 2007

(T.A.No.39/2007 of the Kerala Sales Tax Appellate Tribunal, Addl. Bench, Ernakulam, Order dt.21.4.2007, Assessment Year 2004-05)

Revision Petitioner/Appellant/Assessee:

M/s. Jalaram's,
Hospital Road,
Ernakulam
represented by Power of Attorney Holder,
Ashok M. Shah, Manager.

By Adv. Sri. Vijayan K.U.
& Sri. K.N. Sreekumaran.

RESPONDENT/Revenue/Respondent:

State of Kerala,
Represented by the Secretary to Government,
Taxes Department, Thiruvananthapuram.

By Senior Govt. Pleader Sri. Mohammed Rafiq.

This Sales Tax Revision having come up for admission on 27.09.2007 along with S.T.Rev. No.275 of 2007, the Court on the same day passed the following:

H.L.DATTU, C.J. & K.T.SANKARAN, J.

S.T.Rev.Nos. 275 of 2007 & 285 of 2007

Dated this the 27th day of September, 2007.

O R D E R

H.L.Dattu, C.J.

Since common questions of law and facts are involved in these revision petitions, they are clubbed together, heard and disposed of by this common order.

(2). The matter arises under the provisions of the Kerala General Sales Tax Act 1963, for brevity and convenience, hereinafter referred to as "Act of 1963".

(3). The assessee is a registered dealer under the provisions of Act of 1963 as well as the Central Sales Tax Act (CST Act for short). He is a wholesale dealer in home appliances. Petitioner effects inter-State purchases and effects intra-State sales and also sales in transit as provided under Section 6(2) of the Act read with Rule 3(a) of the Rules. In order to claim the benefit under Section 6 (2) of the CST Act, the assessee had produced E-1 Forms received by him from the selling dealer and also C-Form, lorry receipts etc., along with the annual returns filed for the assessment years 2003-2004 and 2004-2005. The assessing authority after analyzing the aforesaid documents is of the opinion that the assessee is disentitled to the exemption claimed by the assessee under Section 6 (2) of the CST Act read with Rule 12 (4) of the Central Sales Tax (Registration and Turnover) Rules, 1957 and

Rule 11-B of the Central Sales Tax (Kerala) Rules, 1957 Further, the assessing authority has observed that the lorry receipt that was produced by the petitioner contains the destination "self Mahe" and the destination of the end buyer was not shown and therefore, the sale cannot be construed as a "sale in transit" and, therefore, exemption under Section 6(2) cannot be granted.

(4). The assessee being aggrieved by the aforesaid order passed by the assessing authority for the assessment years 2003-2004 and 2004-2005 had carried the matter in appeals before the Tribunal in T.A.Nos.38 of 2007 and 39 of 2007 respectively. The Tribunal has disposed of the appeals on the ground that the same is not maintainable under Section 34 of Act, 1963. The orders passed by the Tribunal is as under:

> *"We are not inclined to accept the above contention of the appellant. The issue involved is whether the disputed transaction comes under section 6 (2) of the CST Act. This dispute can be resolved on the appreciation of the facts and evidence involved in this case. The question whether the disputed transaction comes under a provision of KGST Act is a question of fact and not law. We therefore hold that this appeal is not entertainable before this Tribunal under the provisions quoted above. Point is accordingly found against the appellant."*

(4). Being aggrieved by the order so passed by the Tribunal, the assessee is before us in these revision petitions filed under Section 41 of Act of 1963.

(5). The assessee has framed the following questions of law for our consideration and decision:

(i). Whether on the facts and in the circumstances of the case, the Appellate Tribunal is justified in law in "not entertaining the appeal and returning for presentation before the proper authority"?

(ii). Whether on the facts and in the circumstances of the case, the appellate Tribunal is justified in holding that eligibility for exemption on sale-in-transit under Sec.3 (b) read with Sec. 6(2) of the CST Act is a question of fact and not law?

(iii). Whether on the facts and in the circumstances of the case, the appellate Tribunal is justified in not deciding the appeal by allowing exemption on sale-in-transit covered by the requisite E1 and C Forms and copies of the LRs, applying the settled principles of law declared by this Hon'ble Court in (1994) 4 KTR 348 and Hon'ble High Court of Gujarat reported in 84 STC 317 in exercise of its powers of widest amplitude?

(iv). Whether the Appellate Tribunal is justified in not adverting to the alternate stand of the petitioner that the sale is a direct one taking place between the Ist seller at Pune and the end dealer at Mahe u/s 3 (a) of the CST Act relying on the decision of the Apex Court in English Electic Company's case as accepted by the assessing authority that the goods directly move from the seller at Pune to the end buyer at Mahe in pursuance of sale, in which case the petitioner will have no tax liability?

(5). We heard Sri.K.N.Sreekumar, learned counsel appearing for the petitioner.

(6). The learned counsel would submit that the Tribunal is not justified in rejecting the appeals solely on the ground, that, the issue involved is whether the disputed transaction comes under Section 6(2) of CST Act and the

dispute can be resolved only on the appreciation of facts and the evidence involved, and therefore, they are purely question of fact and not of law. Therefore, the learned counsel requests this court to answer the questions framed by the assessee in affirmative and against the revenue. In support of his contention, the learned counsel has brought to our notice the observations made by a Division Bench of this Court in the case of **Sunitha Diesel Sales & Services Vs. State of Kerala (1996) 4 KTR 348 (Ker)** and the observations made by the Gujarat High Court in the case of **State of Gujarat Vs. Haridas Mulji Thakker (1992) 84 STC 317**.

(7). In our opinion, the one and the only question that would arise for our consideration and decision in these revisions petitions is ' Whether the appellate Tribunal is justified in rejecting the appeals filed by the assessee as not maintainable ?'.

(8). In order to answer the issue that we have raised for our consideration and decision, the provisions of Section 34 of Act of 1963 requires to be noticed. The said provision, omitting what is not necessary, reads as under:

> ***34.Appeals to the Appellate Assistant Commissioner****:-(1) Any person objecting to an order affecting him passed by an appropriate authority under sub-section (6) or sub-section (7) of section 14, sub-section (2) or {sub-section (3) or (sub-section (4) or sub-section (4A) of section 17}, sub-section (1) or sub-section (2) of section 19 {section 19A}, {Section 19B, section 19C), section 26, section 29, {section 29A}, {section 30 {or section 30A or an order passed by a lower authority under section 43} may, within a period*

of thirty days from the date on which the order was served on him, appeal against such order to the Appellate Assistant Commissioner.

(Provided that where the order to be appealed against involves only a question of law which has been settled by a decision of the High Court or the Supreme Court the appeal may be filed before the Appellate Tribunal.)

{Provided further that} the Appellate Assistant Commissioner may admit an appeal presented after the expiration of the said period if he is satisfied that the appellant had sufficient cause for not presenting the appeal within the said period:

{Provided also that} in the case of an order under sub-section (2) or {sub-section (3) {or sub-section (4) or sub-section (4A) of section 17}, or sub-section (1) or sub-section (2) of Section 19, or Section 19B} no appeal shall be entertained under this sub-section unless it is accompanied by satisfactory proof of the payment of the tax or other amounts admitted by the appellant to be due or of such instalment thereof as might have become payable, as the case may be."

(9). Under Section 34 of Act of 1963, any person objecting to an order affecting him passed by an appropriate authority under sub-section (6) or sub-section (7) of section 14, sub-section (2) or {sub-section (3) or (sub-section (4) or sub-section (4A) of section 17}, sub-section (1) or sub-section (2) of section 19 {section 19A}, {Section 19B, section 19C), section 26, section 29, {section 29A}, {section 30 {or section 30A or an order passed by a lower authority under section 43} may, within a period of thirty days from the date on which the order was served on him, appeal against such order to the Appellate Assistant Commissioner.

(10). The proviso appended to the said section carves out an exception. The said proviso authorises a person objecting to an order passed by the assessing authority to file an appeal before the Appellate Tribunal, if the order objecting to involves only a question of law , which has been either settled by the High Court or the Supreme Court and not under any other circumstance.

(11). In the instant case, the assessee had claimed before the assessing authority that the transactions effected by him during the assessment years 2003-2004 and 2004-2005 are sales in transit. In support of the claim, the assessee had produced certain documents. The assessing authority, after scrutinizing those documents has come to the conclusion that the assessee is not entitled to the claim made by him for grant of exemption under Section 6(2) of the CST Act and the Rules framed thereunder. By saying this, we mean, that the assessing authority after appreciating and verifying the documentary evidence produced by the assessee has to come to a conclusion that the transaction in question is not an inter-State sale or a transit sale.

(12). As we have already noticed, the Tribunal can entertain an appeal filed by a person objecting to an order passed by the Assessing Authority if only it involves a question of law, which has been settled by a decision of the High Court or the Supreme Court and not under any other circumstances.

(13). In the present case, firstly the facts require to be noticed and on those facts, the law pronounced by the High Court or the Apex Court

requires to be applied and therefore, it cannot be said that the appeals filed by the assessee before the Tribunal did not involve any question of fact, but it involves only question of law. Keeping in view all these aspects, the Tribunal, in our opinion, has rightly rejected the appeals filed by the assessee against the order of assessment passed by the assessing authority for the assessment years 2003-2004 and 2004-2005 In that view of the matter the questions of law framed by the assessee requires to be answered against the assessee and in favour of the Revenue.

(13). After the disposal of the revision petitions, the learned counsel for the assesee requests us for granting sufficient time to file appeals against the order passed by the assessing authority for the assessment years 2003-2004 and 2004-2005 before the first appellate authority. In our opinion, the request of the learned counsel is reasonable and if it is granted, no prejudice would be caused to the other side. Therefore, the assessee is granted a month's time from today to prefer appeals against the orders passed by the assessing authority for the assessment years 2003-2004 and 2004-2005 before the first appellate authority. If such appeals are filed within the time granted by this Court, the first appellate authority shall dispose of the appeals on merit, without reference to the period of limitation. All other contentions of the parties are left open.

(14). In view of the orders passed in the revision petitions, all pending interlocutory applications are closed.

Ordered accordingly.

(H.L.DATTU)
CHIEF JUSTICE

(K.T.SANKARAN)
JUDGE

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